

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**CONSOLIDATED NETWORKS CORPORATION**

**Employer**

**and**

**Case 31-RC-263768**

**INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS,  
DISTRICT LODGE 725**

**Petitioner**

*Chad Horton, Esq.*  
for the Employer

*David Fujimoto, Esq.*  
for the Petitioner

**REPORT AND RECOMMENDATIONS ON CHALLENGED BALLOTS<sup>1</sup>**

**INTRODUCTION**

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. This hearing was held before me on November 18, 2020,<sup>2</sup> over the challenged ballots of James Kwak and James Overton. Both cast votes in the mail-ballot election to determine whether a unit of employees working for Consolidated Networks Corporation (the Employer) at Fort Irwin, California wanted to be represented for the purposes of collective bargaining by the International Association of Machinists and Aerospace Workers, District Lodge 725 (the Petitioner).

The Petitioner challenged Kwak because he contacted the Board's regional office prior to the count to ask that his ballot be removed from consideration. The Petitioner argues that if the will of the voters is of paramount importance in elections, then voters should be allowed to request that their ballot not be counted. The Employer counters that under Board law once a voter casts their ballot, they lose control over its disposition and may not as a matter of right have it withdrawn.

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<sup>1</sup> Abbreviations in this report are as follows: "Tr." for Transcript; "Bd. Exh." for Board's Exhibits; "Jt. Exh." for Joint Exhibits; "U. Exh." for Petitioner's Exhibits; "Er. Exh." for Employer's Exhibits. Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based on my review and consideration of the entire record.

<sup>2</sup> All dates refer to 2020, unless otherwise stated.

The Petitioner challenged Overton claiming he was not regularly employed in the stipulated unit. Specifically, it argues that during the period prior to the eligibility date Overton primarily worked out of the Employer's facility in Montgomery, Alabama and worked on projects other than the project the other unit employees were assigned. The Employer counters that Overton has held a full-time unit position supporting the Employer's operations at Fort Irwin and has worked extensively on the relevant contract. Overton worked a significant portion of those hours in Montgomery only because of the COVID-19 pandemic and the contractor's directive to the Employer that it would not permit travel to Fort Irwin from out of state. The Employer further argues that Overton meets the definition of a regular part-time employee.

For the reasons stated below, I recommend overruling the challenge to Kwak's ballot and sustaining the challenge to Overton's ballot.

### **PROCEDURAL HISTORY**

The Petitioner filed the petition on July 29. On August 18, the Regional Director approved the parties' Stipulated Election Agreement for a mail-ballot election in the following unit:

Included: All full-time and regular part-time Senior Network Administrators, System Administrators in Information Technology, Instrumentation System Administrators, Database Administrators, and Information System Administrators employed by the Employer at its operations located at Fort Irwin, California

Excluded: All other employees, drivers, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

Those eligible to vote in the election had to be employed in a unit position during the payroll period ending August 15. The Region mailed out the ballots on September 10, and they due back to the Region by September 28. (Jt. Exh. 1). The Region counted the ballots on October 2, and the tally of ballots shows that 4 votes were cast for, and 2 votes were cast against, the Petitioner, with 2 challenged ballots that were sufficient to affect the results of the election.

On October 27, the Regional Director ordered a hearing over the challenged ballots. The case was assigned to me, through the Division of Judges, to conduct the hearing and prepare a report and recommendations. The hearing occurred via videoconference due to the compelling circumstances caused by the COVID-19 pandemic. At the hearing, all the parties were afforded a full opportunity to be heard, to call and examine witnesses, and to introduce evidence on the issues to be considered. The Petitioner and the Employer submitted post-hearing briefs summarizing their respective positions on the issues, which I have carefully considered.

## FACTUAL FINDINGS<sup>3</sup>

### *A. Employer's Operations at Fort Irwin*

5           The Employer is engaged in the design, installation, and administration of communication networks and systems. It is headquartered in Oklahoma City, Oklahoma and works with defense contractors, like the Lockheed Martin Corporation and the Raytheon Company, providing information technology services at military training centers throughout the country. This includes the National Training Center at Fort Irwin, which is a U.S. Army base about the size of Rhode Island in northern San Bernardino County, California. Approximately 10 times a year, a battalion from another base or post comes to Fort Irwin for a 21-day training "rotation" of simulated combat exercises. Data from these exercises is collected, stored, and analyzed using the base's information systems and networks, which the Employer helps support.

15           For 10 years, Raytheon had a training contract with the U.S. Army, referred to as the Warfighter FOCUS/WTa contract, which covered Fort Irwin. For that contract, Raytheon subcontracted with the Employer to monitor and service Fort Irwin's administrative network (used for operational purposes) and its warfare network (used for combat training purposes), in addition to other functions.

20           In 2018, the U.S. Army reopened its training contract for bidding. Raytheon and Lockheed Martin both submitted bids. The U.S. Army eventually divided the work and awarded Raytheon the contract covering the administrative network and Lockheed Martin the contract covering the warfare network, both beginning January 1, 2019. Lockheed's contract is under the Army Training Aids, Devices, Simulators and Simulations (TADSS) Maintenance Program (ATMP), which covers much of the same work Raytheon and the Employer performed under the Warfighter FOCUS/WTa contract.

30           In September 2019, Lockheed subcontracted with the Employer to perform system and network administration and maintenance under the ATMP contract at Fort Irwin, with primary responsibility for the Combat Training Center Information System (CTC IS). (Tr. 124-125; 227). The Employer has 12-13 non-supervisory employees who work under the ATMP contract at Fort Irwin. Of those, there are the 8 unit employees at issue. They all work in Room 182 of Building 990 at Fort Irwin and report(ed) to Site Lead Randy Pierce (until he left the company in August 2020). During rotation weeks, the Employer provides staffing and support 24 hours a day, 7 days a week. The rest of the time the employees typically work 8 hours a day, Monday through Friday.<sup>4</sup>

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<sup>3</sup> The Findings of Fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as in conflict with credited evidence or because it was incredible and unworthy of belief. In assessing credibility, I relied upon witness demeanor, recollection, testimonial consistency, corroboration, established or admitted facts, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Where necessary, specific credibility determinations are set forth below.

<sup>4</sup> The Employer has an agreement with Raytheon, referred to as the TSC contract, to staff the Security Operation Center (SOC) for the administrative network at Fort Irwin. There are 4 employees and 1 site lead handling this work. These employees are not part of the stipulated unit.

According to the job description, the Senior Network Administrator on the ATMP contract: installs, configures and maintains network components, including switches, routers, wireless, VPN, firewall devices, and TACLANES (an encryption device) supporting the relevant information systems; performs routine tests to ensure the condition and security of the networks; coordinates and schedules installation/relocation of network equipment; monitors network performance and troubleshoots issues; and other related duties. (U. Exh. 2).

Fort Irwin hosted training rotations through mid-March 2020. At around that time, the U.S. Army cancelled/postponed upcoming training rotations in response to the COVID-19 pandemic. Lockheed also issued a memorandum to its employees, which was shared with its subcontractors, to restrict non-essential air travel through April. (Er. Exh. 4). Lockheed later extended the travel restriction through July. The Employer decided internally to not require air travel by its employees through July. (Tr. 230-231).

According to the Employer's Program Manager, William Nault, in April and part of May, the Employer had minimal staffing at Fort Irwin, and most of the employees working under the ATMP contract were "sitting at home just idle, doing nothing." (Tr. 49). The exceptions were Senior Network Administrator Jaime Ramirez and Site Lead Randy Pierce, who continued working remotely using secure laptops.

Training rotations at Fort Irwin resumed in June. In July, one of the ATMP employees tested positive for COVID-19, and the unit employees were barred from the base for a period of time. Lockheed later allowed the Employer to remove laptops from the base to allow the employees to support the rotations remotely. (Tr. 65). The laptops, however, could not be shipped or mailed for security reasons. (Tr. 128-129). Also in July, the Employer used the ATMP employees to perform a laptop imaging project for Raytheon. (Tr. 53). At the time, Raytheon was working as a subcontractor for Lockheed, and Lockheed wanted the Employer to only utilize local staff to perform this imaging work. The record does not reflect how often or for how long these employees worked remotely. (Er. Exh. 5).

#### *B. James Overton*

James Overton has worked for the Employer as a Senior Network Administrator since 2014. He works at the Employer's Montgomery, Alabama facility. He has traveled to military bases across the country to work on projects. He traveled to Fort Irwin between 2014-2016 to work under the Warfighter FOCUS/MTA contract, and he continued to provide support until that contract expired in late 2018. (Tr. 189-190). In 2018 and 2019, Overton supported an unrelated contract for a project at Hanscom Air Force Base in Massachusetts. (Tr. 147-148).

In January 2020, the Employer wanted Overton to begin providing support on the ATMP contract at Fort Irwin based on his skills and experience. On January 21, William Nault, the Employer's Program Manager, emailed Overton about traveling to Fort Irwin to work on the ATMP contract between January 27-February 7. Overton responded he was unavailable to travel because he had been called for jury duty. In March, the Employer scheduled Overton to provide "fly-in support" as a Senior Network Administrator between March 6-17. Overton flew to

California on March 5, worked on the ATMP contract at Fort Irwin on March 6, 7, 8, 9, and 13-16, and then flew back to Alabama on around March 17. (Tr. 150-151). He worked a total of around 88 hours during this period. (Er. Exh. 5).<sup>5</sup>

Due to the COVID-19 travel restrictions, Overton remained in Alabama until around August 11. During those months, he worked full time at the Employer's Montgomery facility. He primarily worked on a special project for Raytheon developing, assembling, and configuring a mobile networking device, referred to as the Strategic Tactical Entry Point (STEP) box. (tr. 58-59). The STEP box is an updated version of an existing device, called the ORTS kit, used to encrypt and transmit data on a wireless network that allows the troops to track and display positioning and locations on a two-dimensional map. Originally, Raytheon wanted the STEP box project performed at Fort Irwin, and the Employer would have had Senior Network Administrator Ramirez and Site Lead Pierce handle the work. But the Employer proposed, and Raytheon eventually agreed, to have Overton perform the work at the Employer's Montgomery facility, because that facility was available, and the project would keep Overton busy while he was unable to travel. (Tr. 232-233). Overton estimated that between March and early to mid-August, he spent 80-90 percent of his time securing, assembling, and configuring the STEP box. (Tr. 166).

In performing this work, Overton installed switches, routers, a wireless device, virtual private networks, encryption devices, and firewall-like features, all of which would be configured so the STEP box could work as a local area network (LAN) "in a can." (Tr. 103, 127, 163-164). During this process, Overton communicated with Ramirez about firewall functions and network connectivity. (Tr. 164-166). In September, Network Administrator Dekar Colin sent Overton an email responding to questions Overton had about the connectivity of the STEP box to the network firewall. (Tr. 123-124) (Er. Exh. 8).

When Overton worked at Fort Irwin in March, he reported to Pierce, as did all the unit employees working there. (Tr. 152). When Overton was at the Montgomery facility working on the STEP box, he reported directly to Nault. The rest of the time Overton reported to the Employer's Managing Director, Edward Kusbel. (Tr. 200).

In early to mid-August, the Employer sent Overton back to Fort Irwin to provide rotational support on the ATMP contract because Ramirez went out on family leave, and Pierce resigned. (Tr. 57). Overton worked at Fort Irwin approximately 37 hours between August 11-14, and approximately 57.83 hours between August 17-22. He then returned to Montgomery for the next two weeks. (Er. Exh. 6, pp 6-7). On around September 7, Overton travelled to Fort Irwin to deliver the completed STEP boxes and to provide demonstrations on how they worked. (Tr. 221). He remained there until September 11, and then returned to Montgomery. (Er. Exh. 6, p. 8). As of the hearing, Overton has not returned to Fort Irwin. (Tr. 173)

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<sup>5</sup> The Employer's Managing Director, Edward Kusbel, testified it was his plan to have Overton support every training rotation at Fort Irwin for the entire year. (Tr. 228). While this testimony was not refuted, I do not credit it. There is no evidence Kusbel communicated his plan to Nault, Overton, or anyone else, which I find highly unusual if the Employer was expecting Overton to travel to Fort Irwin at least 2 weeks a month for the rest of the year. Aside from March 6-17, Overton does not appear on any of the Fort Irwin work schedules through at least October. (Er. Exh. 5).

C. *James Kwak*

James Kwak works as a Systems Administrator for the Employer on the ATMP contract at Fort Irwin. The parties stipulated that Kwak timely returned his completed mail ballot but then called the Region prior to the count to request that his ballot be withdrawn. At the count, the Board agent relayed this information to the parties, and the Petitioner challenged his ballot. (Tr. 17-18). There was no other evidence presented regarding Kwak or these events.

**LEGAL ANALYSIS**

A. *Burden of Proof for Challenged Ballots*

The party challenging a voter's ballot or eligibility bears the burden of proof. See *Sweetener Supply Corp.*, 349 NLRB 1122, 1122 (2007). As such, the Petitioner bears the burden of proving why the ballots from Overton and Kwak should not be counted.

B. *Ballot of James Kwak*

The Board has held an employee may freely choose whether or not to vote in a representation election; however, once they have voted, the ballot cast is no longer within their control. *City Stationery, Inc.*, 340 NLRB 523, 525 (2003); and *T&G Manufacturing*, 173 NLRB 1503, 1504 (1969). In *Great Eastern Color Lithographic Corp.*, 131 NLRB 1139, 1140-1141 (1961), the Board explained the rationale for this rule:

It is our view that once a ballot, whether or not it has been challenged, has been duly cast in an election, the voter loses control over its disposition and may not as a matter of right have it withdrawn. While the Board fully appreciates the need for the expeditious handling of elections, we are also cognizant that such expedition must be balanced with our obligations under the Act to conduct orderly elections with sufficient safeguards to prevent possible abuses of the election processes. To permit withdrawals of ballots would in certain cases, as here, place the finality of the election in the hands of such voters. Moreover, countenance of such a practice could conceivably open our elections to possible abuses since, once the election results were known, pressures of various kinds could be exerted upon voters to withdraw their ballots to achieve a desired election result.

The Petitioner argues that because this was a mail-ballot election, as opposed to a manual election, Kwak's ballot was never entered into the ballot box; therefore, these same policy considerations against allowing withdrawal do not apply. I disagree. Kwak's ballot was cast once it was returned to the Region prior to the deadline, and the same concerns about undue pressure or influence that exist with manual elections exist with mail-ballot elections. In fact, those concerns are arguably greater, considering the additional time and opportunity to pressure or influence voters between the casting and counting of their mail ballots.

Thus, I recommend overruling the Petitioner's challenge to Kwak's ballot.

C. *Ballot of James Overton*

When an election is conducted pursuant to a stipulated election agreement, the Board applies the three-step test set forth in *Caesars Tahoe*, 337 NLRB 1096, 1097 (2002), to determine whether a challenged voter is included/excluded from the unit. Under this test, the Board first decides whether the stipulation is clear or ambiguous regarding the inclusion/exclusion of the challenged voter. If the objective intent is clear from the language, the Board will hold the parties to their stipulated agreement. If it is not, the Board will attempt to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If intent still cannot be discerned, the Board determines if the voter shares a community of interest with those in the unit. *Caesars Tahoe*, supra.

In determining whether the stipulation is clear or ambiguous, the Board will compare the descriptive language of the stipulation with the specifics of the challenged voter. If the voter's title or classification fits the descriptive language, the Board will find the parties' intended to include the voter in the unit. If the voter's title or classification does not fit the descriptive language, it will find the parties' intended to exclude the voter from the unit. The Board bases this approach on the expectation that the parties are knowledgeable about the job titles, classifications, or descriptions they intend to be included/excluded and will stipulate to language that describes them. See *Viacom Cablevision*, 268 NLRB 633, 633-634 (1984). If a job title, classification, or description is not included, and there is an exclusion for "all other employees," the Board will read the stipulation as clearly excluding that job title, classification, or description. See *Los Angeles Water and Power Employees' Assn.*, 340 NLRB 1232, 1235 (2003). See also *Bell Convalescent Hospital*, 337 NLRB 191 (2001); and *National Public Radio, Inc.*, 328 NLRB 75 (1999).

The same holds true where the stipulation describes the unit based on their specific job site or location(s). See *St. Vincent Hospital, LLC*, 344 NLRB 586 (2005). In *St. Vincent*, the employer operated the principal facility, two facilities across the street, and one facility two miles away. In the stipulation, the parties agreed to an election of nonprofessional employees, including secretaries, employed at the employer's principal facility and the facility two miles away. A secretary who worked at one of the facilities across the street voted and had her ballot challenged. The judge found the secretary was eligible to vote because she shared a community of interest with the unit employees. The Board reversed, stating the inquiry ends at the first step of the *Caesars Tahoe* analysis because the stipulation unambiguously limited the unit to those working at the two identified facilities.

Here, like in *St. Vincent*, the inquiry ends at the first step. The stipulation clearly states the unit only includes "[a]ll full-time and regular part-time Senior Network Administrators ... employed by the Employer at its operations located at Fort Irwin, California," and excludes "all other employees." Thus, the issue is whether Overton, who works at the Employer's Montgomery facility but occasionally travels to work at Fort Irwin, qualifies as a full-time or regular part-time Senior Network Administrator employed by the Employer *at its operations located at Fort Irwin*. If not, the exclusion of "all other employees" evinces the parties' intent not to include him.

Overton is a full-time Senior Network Administrator, but he does not hold position at Fort Irwin. The question then is whether he holds the position there on a regular, part-time basis. The formula typically used for determining whether an existing employee works with sufficient regularity to qualify as a regular part-time employee is set forth in *Davison-Paxon Co.*, 185 NLRB 21, 23-24 (1970). Under the *Davison-Paxon* formula, the employee must average at least 4 hours of unit work per week during the last quarter (13 weeks) immediately prior to the election eligibility date. Id. See also *Woodward Detroit CVS, LLC*, 355 NLRB 1115 (2010).<sup>6</sup>

The eligibility date in this case is August 15. During the quarter (13 weeks) immediately prior to that date, Overton only worked at Fort Irwin from August 11 to August 14. He worked a total of 37 hours, for a quarterly average of 2.86 hours per week. Accordingly, Overton did not work enough hours to be classified as a full-time or a regular part-time unit employee.<sup>7</sup>

The Employer argues the numerous hours Overton spent working on the STEP box should be included in any calculation. As justification, the Employer asserts that: Overton was working full time as a Senior Network Administrator; he was working on the STEP box for it to be used on the ATMP contract at Fort Irwin; he was performing tasks that fell within a Senior Network Administrator's job description; he communicated with unit employees while performing those tasks; and the work he performed would have otherwise been done by unit employees at Fort Irwin. I reject this argument. The parties, knowing where the employees, including Overton, were working, how often, and for how long, stipulated to a unit limited to those regularly employed at Fort Irwin.<sup>8</sup> Overton performed the STEP box work 2,000 miles from Fort Irwin. Although Raytheon wanted the work done at Fort Irwin, it agreed to the Employer's request to move it to Montgomery in order to keep Overton busy while he was unable to travel. Additionally, regardless of whether this STEP box was similar to the unit work performed at Fort Irwin, when Overton was performing it, he had limited interaction with unit employees and received different supervision.

The Employer alternatively argues that Overton qualifies as a dual-function employee. The test for determining whether a dual-function employee should be included in a unit is "whether the employee [performs unit work] for sufficient periods of time to demonstrate that he ... has a

<sup>6</sup> The Board has recognized that "special circumstances" may warrant deviating from the *Davison-Paxon* formula when the unit consists of employees that have an irregular or sporadic pattern of employment based on their work or industry. This occurs in the live performance entertainment industry. Compare *Kansas City Repertory Theatre, Inc.*, 356 NLRB 147 (2010), and *Julliard School*, 208 NLRB 153 (1978) with *Wadsworth Theater Management*, 349 NLRB 122 (2007), and *Steppenwolf Theatre Co.*, 342 NLRB 69, 71 (2004). Here, all the employees, except for Overton, have a regular pattern of employment at Fort Irwin. As such, there are no special circumstances that warrant deviating from the *Davison-Paxon* formula, particularly where, as here, the parties could have addressed Overton's situation when they agreed to the unit description. See generally, *Saratoga County Chapter NYSARC, Inc.*, 314 NLRB 609 (1994)(no special circumstances found where drivers worked on an as needed or an on-call basis).

<sup>7</sup> The Employer asserts Overton's reduced hours at Fort Irwin were an anomaly, and the only reason he was not there more was because of the travel restrictions. However, there were no travel restrictions in place between September 1, 2019 and March 5, 2020, and Overton performed no work at Fort Irwin during that 25-week period. Nor has he performed any work there since the election ended.

<sup>8</sup> If the parties intended to include employees at other locations, they arguably could have stipulated that the unit consisted of those in covered positions employed by the Employer *for* (as opposed to "at") its operations located at Fort Irwin, and not excluded all other employees.



substantial interest in the unit's wages, hours, and conditions of employment." *Berea Publishing Co.*, 140 NLRB 516, 518-519 (1963). However, the Board has held the dual-function analysis is a variant of the community-of-interest test, and it is not applied where the parties' intent to exclude is clear. See *Peirce-Phelps, Inc.*, 341 NLRB 585, 585-586 (2004); *Bell Convalescent Hospital*, 337 NLRB at 191. As stated, the parties clearly intended the unit to only include those "employed by the Employer at its location at Fort Irwin" and exclude "all other employees." Based on this language and the evidence regarding Overton's hours, he is excluded from the unit.

I, therefore, recommend sustaining the Petitioner's challenge to Overton's ballot.

### **CONCLUSION AND ORDER**

Pursuant to Section 102.69(c)(1)(iii) of the Board's Rules and Regulations, any party may file exceptions to this Report, with a supporting brief if desired, with the Regional Director of Region 31 by December 22, 2020. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Exceptions must be E-Filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the exceptions should be addressed to the Regional Director, National Labor Relations Board, 11500 West Olympic Blvd., Suite 600, Los Angeles, California 90064 and must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden.

Pursuant to Sections 102.111–102.114 of the Board's Rules, exceptions and any supporting brief must be received by the Regional Director by close of business at 5:00 p.m. Pacific Time on the due date. If E-Filed, it will be considered timely if the transmission of the entire document through the Agency's website is accomplished by no later than 11:59 p.m. Pacific Time on the due date.

Within 5 business days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director.

Dated, Washington, D.C., December 8, 2020.




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Andrew S. Gollin  
Administrative Law Judge